IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION STUDENT-ATHLETE CONCUSSION INJURY LITIGATION,	) Docket No. 13 C 9116)) Chicago, Illinois) March 3, 2016) 2:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS - STATUS, MOTION
BEFORE THE HONORABLE JOHN Z. LEE

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(Proceedings had in open court:)

THE CLERK: 13 C 9116, NCAA Student-Athlete Concussion Injury Litigation, for status and motion hearing.

MR. BERMAN: Good afternoon, your Honor. Steve Berman on behalf of the proposed class. With me is my partner, Elizabeth Fegan.

MR. MESTER: Good afternoon, your Honor. Mark Mester and Johanna Spellman on behalf of the NCAA.

MR. McLAWHORN: Todd McLawhorn also here from Siprut PC on behalf of the plaintiff class.

MR. EDELSON: Good afternoon, your Honor. Jay Edelson on behalf of the lead objector.

THE COURT: Who do we have on the phone?

MR. BERG: Excuse me?

THE COURT: If you are on the phone, can you identify yourself please?

MR. BERG: Yes. Marc Berg, Marc B-e-r-g, in Minneapolis on behalf of Paul Morgan, Cliff Deese and Joey Balthazor.

MR. JEFFERSON: Judge, also Dwight Jefferson on behalf of the objector.

THE COURT: All right. Good afternoon, everyone.

Is anyone else on the phone that I missed?

All right. We are here for status in this case. There have also been a couple of motions that have been filed.

Let me deal with them first.

First of all, with regard to the motion of plaintiff Whittier to supplement the record previously presented to the Court, not sure what relief they are seeking, but certainly their objections that they filed are of record. The Court, frankly, I reviewed the objections before issuing my January 26, 2016 opinion. And because the issues that they raise are basically similar, if not identical, to the objections and issues that were raised by Nichols' counsel, that's why I didn't refer to Whittier directly. But certainly, the -- I did review it before issuing the January 26, 2016 order and took those arguments into consideration. They are part of the record.

So the other motion, housekeeping matter, is motion for leave to withdraw as counsel. That motion is granted.

And then finally, there is a motion by the NCAA for leave to supplement the record previously presented to the Court. Mr. Mester, it's your motion. Go ahead if you want to speak on it.

MR. MESTER: Thank you, your Honor.

As we set forth in the papers, we are requesting leave to provide the Court with additional record material that was not provided to the Court previously, with the focus in this instance on the proposed single-school, single-sport classes that were addressed in your Honor's January 26 opinion.

The issues we would like to address would be on the one hand ascertainability as informed by the relevant medical literature, and on the other hand the other relevant Rule 23 factors, namely ascertainability, typicality, predominance, manageability and superiority, again as informed by the prior record amassed in the Arrington case.

THE COURT: Okay. So I take it that the supplemental information would be addressed towards -- I guess in my January 26 order I stated, quote: "The factual record before the Court, however, does not provide sufficient facts from which the Court can conclude that a class that is much more narrowly defined in terms of size, type of sport and/or time period could never be certified against a particular school. Nor can the Court conclude from the present record that a very narrowly defined, single-school personal injury class could never be certified against the NCAA."

And the purpose of the supplemental filings and the supplemental factual information that the NCAA provide would be to address that particular issue, is that correct?

MR. MESTER: That's correct, your Honor. The prior briefing we attempted to, and I believe we did, address the two proposed classes that the lead objector, Mr. Nichols, was proposing, the nationwide (b)(3) class on the one hand and the (c)(4) class on the other. You certainly did address those and had I think an adequate -- more than adequate record before

your Honor.

But we'd now like to -- an opportunity to address the narrower classes that you -- that you alluded to in your January 26 order.

MR. JEFFERSON: Your Honor, would that relate to the classes -- the class that I referenced in my filings of football players between the years 1960 and 2014?

THE COURT: I think what -- it would be a much more narrow class, right? I would take it from Mr. Mester that the NCAA wants to basically make the argument that, based upon the factual record that's been developed in the cases that have been previously before the Court, that the Court has a reasonable basis to determine or conclude that the likelihood of a 23(b)(3) damages class, even if it's limited to a single school, that the value of such a class or the value of that procedure right would be minimal.

MR. MESTER: That's correct, your Honor.

MR. JEFFERSON: I am not understanding that, Judge. Value in the sense of the damages that can be recovered?

THE COURT: No, value in terms of how likely is it for a Rule 23(b)(3) class to be granted in a single-school context.

MR. JEFFERSON: Thank you.

THE COURT: Okay. And obviously, Mr. Mester, that raises a lot of different permutations, right? So you could imagine a class, single school, single sport, single year. But

you can also imagine the scenario where you may have multiple teams of a sport over several years that may have had the same coach and the same overall procedures or lack of procedures. One can also imagine, I suppose, a scenario where you might have athletes of various sports.

Say, take a hypothetical example, and this is purely hypothetical because I don't have any other record before me. But say, one can imagine that if there were a school to exist where you had medical personnel that adequately addressed concussion-related or head injuries in football, but perhaps not in baseball, soccer and hockey, that those athletes may file suit over one year or a number of years, depending on the permutation.

So I guess there is a number of factors to consider in trying to assess the likelihood of a 23(b)(3) class taking place in a single-school context.

MR. MESTER: Yes, your Honor. And what we have in mind is bringing to your Honor's attention, that -- that -- the received literature on the incidence rate of concussions and also then the rate of long-term effects from those concussions, which would inform the viability of the claims, but also the numerosity of any proposed class along those various permutations, and then in addition to that address, based upon the record that's been amassed in Arrington, what the individual claims look like, and -- and why in our view they

would not be amenable to class treatment even for a narrower class.

MR. JEFFERSON: Judge, what I am getting from -- from your question and as you laid out the hypothetical is that what counsel is asking to do would -- does appear to be quite premature from the standpoint before any -- any of these cases have been filed, for asking the Court to make a determination as you pointed out.

There are a lot of factors that may be involved with that, like a coach that had been on the school for 20 years, as opposed to a school that had ten coaches for 20 years, or as you pointed out, the standards related to basketball as opposed to football or soccer.

And so thinking that that may in fact be premature to ask the Court at this time to make a determination on cases that have yet to be filed and are before the Court.

THE COURT: Well, I guess, the difference would be that I'm not making a binding determination, right? I'm making a determination with regard to -- well, in the context of my settlement fairness analysis. And so in my opinion of January 26, 2016, I noted on page 3 that to the extent the settling plaintiffs and the NCAA are agreeable to these modifications, that is referring to the modification that I suggested, or otherwise able to address the Court's concerns, preliminary approval of the amended class settlement is granted.

What I'm hearing from the NCAA is that they believe that they can address the concerns I've raised with regard to whether or not I can assess or determine the likelihood of certification of a 23(b)(3) class in a single-school context, as I have described in my written opinion.

MR. MESTER: That's correct, your Honor.

THE COURT: So I guess, Mr. Jefferson, what I'm saying is that it's not so much -- I don't construe it as them wanting an advisory opinion of me with regard to, say, a University of Illinois or Washington or take your pick. But it's really to address the concerns that I raised in my January 26, 2016 opinion with regard to whether or not the record is sufficient for me to make any sort of assessment as to the probability or likelihood of class certification in those -- in that limited context.

All right.

MR. JEFFERSON: Judge, can I add then that -- I mean, from what I've read, it appears that one of the primary issues related to, you know, addressing the class certification is superiority from the standpoint whether individual cases -- whether the cases can go forward individually, or whether under the doctrine of superiority they should be included in the class, even if that is in the form of a -- of a subclass as a limited subclass, with the argument being that cases that are of low value, that those cases will then benefit from class

certification.

And from the standpoint of what is -- which -- what is attempted to be accomplished by class certification, that is a fairness in disposition of the cases, that superiority really should control. And that should be a very serious consideration, very serious consideration of the Court.

THE COURT: You mean in assessing a 23(b)(3) class, the viability of a 23(b)(3) class?

MR. JEFFERSON: Taking 23(b) with 23(c)(5) and the considerations of 23(c)(5) as relates to any questions of where the interest of -- of a class counsel may be divergent, as the Court pointed out in Amchem and Ortiz, that in those instances, superiority really does argue for a subclass. And both of those cases spoke to that.

THE COURT: In the context of 23(b)(3) and 23(c)(4). I believe that certainly superiority is one of the factors that the Court needs to consider in determining whether a 23(b)(3) class or 23(c)(4) class should proceed. But obviously the question is, can all of the different factors of Rule 23 be met when it comes to 23(b)(3) certification.

MR. JEFFERSON: I'm sorry, Judge.

THE COURT: Do you have anything to add?

MR. JEFFERSON: Well, I was going to add that from my reading, I though that the whole issue related to numerosity, commonality, that those issues from what I -- from the reading

that I've made, what's been filed, I thought those issues had been resolved and that there was no dispute over those.

THE COURT: I think that is exactly what I understand that the NCAA is attempting to dispute.

MR. MESTER: That's right, your Honor.

MR. JEFFERSON: At this time, post the -- post the Court's memorandum and order? Not before.

THE COURT: We are post my memorandum and order, yes. So I think what they are trying to do is, they are saying, look. They are saying, look, Judge, you know, we were trying to address the class -- the way I perceive their arguments is that the NCAA was trying to address the class definitions that were set forth in the complaints as well as the various objections that were raised. And it was in that context that they presented me with the factual record.

Because of the issues that I have raised in my memorandum opinion and order, they believe that they can otherwise address the concerns that I raised with regard to the certifiability of a damages class in a single-school context, based upon the record that's currently before the Court or has been developed in the Arrington case. So that's how I conceive it.

As a matter of procedure, given the fact that, Mr. Mester, the Court has ruled on the joint motion for preliminary approval of the amended class settlement and certification of

settlement class, rather than providing supplemental briefing, it seems to me that just as a housekeeping matter, procedural matter, that what you may want to do is provide that material in the form of a renewed motion for approval, preliminary approval, of some type.

MR. MESTER: With all due respect, we actually understood your order a little differently. We understood it to be a conditional grant of preliminary approval subject to either agreement by the parties to the proposed modification that the Court has suggested in its opinion or some other alternative means to address the Court's concerns.

What we'd like to do with the supplemental briefing is try to address the Court's concern. Our understanding was, we didn't have and don't have preliminary approval until we've done one or the other, and we've done neither.

THE COURT: I see. So what you want to do is, you want to -- rather than making -- renewing the motion, you just want to file a supplemental information so that you can basically complete one of the conditions of my prior ruling.

MR. MESTER: Yes, your Honor.

THE COURT: Okay. So how much time do you need for that submission?

MR. MESTER: Forty-five days, your Honor, is what we are requesting.

THE COURT: Mr. Berman, any thoughts?

MR. BERMAN: I have no objection to the motion. We too did not focus on the single-school issue. We focused on the nationwide classes and the proposed nationwide (b)(3) class Mr. Nichols focused on. So we didn't really present you information that's in this record that we think would help you value a single-school claim.

So we too would like to supplement the record.

THE COURT: And can you do so in the 45 days as well?

MR. BERMAN: Yes, sir. I can actually do it in 30, if that would help the Court. I don't have to wait for the Claro group.

THE COURT: Thirty days is fine. Thank you.

Mr. Edelson?

MR. EDELSON: Your Honor, we haven't seen their briefs. The -- we expressed a great bit of skepticism that they are going to be able to do anything, given that the discovery that was taken doesn't address this point.

I'm hoping, expecting, that you will give us a chance to respond. And we may -- we may well argue that the record just isn't -- isn't there for you to make the determination, and/or we should get to do some other discovery.

I do believe that the issue of numerosity is in a slightly different category. I think that that might be something that they could do a little bit more easily, rather than get into what did the University of Hawaii do from 1994

through 1996 with this coach.

But perhaps it was discovery into that, and I just missed it when I looked -- when I looked into the discovery.

THE COURT: Well, let's do this. I would certainly entertain a request for a response if I think one is necessary. So let's see what is filed first. And then we will reconvene after that, after we have all had a chance to take a look at it.

Mr. Jefferson, anything to add at this point?

MR. JEFFERSON: No, Judge. I guess, since, as the Court has pointed out, this is being allowed in response to a question raised by the Court in its memorandum order that, although otherwise it may be considered to be an advisory opinion, if in fact they are asking the Court to make a ruling on it, as opposed to providing, as the Court has said, as the Court raised -- raised the issues, question, in its memorandum, just be responding to an inquiry of the Court as opposed to asking the Court to make an advisory opinion regarding cases that have yet to be filed.

MR. MESTER: Just to clarify, your Honor, we certainly do not intend to ask you to make an advisory opinion. But as you said, instead we want to provide you with the additional record, materials, that would allow you to complete your fairness analysis with respect to the single-school and single-school, single-sport classes that were referred to in your

January 26 order.

MR. JEFFERSON: But, Judge, my understanding is, the issue before the Court that was addressed was the issue of the nationwide class, which the Court, from what I read, ruled on it, said there can be none. And that was the issue before -- my understanding, the issue before the Court raised in that briefing.

THE COURT: Well, the issue that I was addressing was the fairness of the settlement and the scope of the release of being able to proceed on a class-wide basis for personal injury claims.

So that was the context in which that was raised.

MR. JEFFERSON: Judge, because as was raised by the counsels in response briefing, and as the Court addressed in -- in your memorandum order, the District Court in New York has found in relation to the NFL litigation a basis for moving forward with personal injury class actions in that case.

THE COURT: Mr. Jefferson, I am well aware of what Judge Brody did with regard to the NFL concussion litigation. And I have addressed that in my opinion.

MR. JEFFERSON: Yes, sir.

THE COURT: As I noted, on a nationwide basis or even on a multiple-school basis, that this case is very different from the NFL concussion case. And so I do think it's appropriate, if there is information on the record that would

help me determine the plausibility of a 23(b)(3) personal damages class on a school-by-school basis, I do think it's appropriate for me to consider it. Now, whether or not I will be persuaded is another thing. But certainly, I think it's worth considering.

So let's do this. To the extent that the NCAA and the settling plaintiffs wish to file supplemental authority and materials, why don't I set a deadline, a single deadline, for both. And so I want both to be filed by April 15.

MR. JEFFERSON: Judge, is there going to be a page limit on that?

THE COURT: That's a very good question, Mr. Jefferson.

How many pages can I expect? I do have a lot of pages already on all of these issues.

MR. MESTER: Your Honor, obviously it hasn't been written yet. I would say 35 or less, certainly no more than 35. If we can do it in 25, we'll do it in 25.

MR. BERMAN: Same here, your Honor.

THE COURT: All right. I will give you each 35 pages. And then let's set this for status on April 21. My late morning and afternoon are open. I know some counsel are flying from out of town. What is more convenient for your flight schedule, early or late?

MR. JEFFERSON: I generally come in the night before,

Judge. So whichever the Court prefers, morning or afternoon.

MR. BERMAN: It's up to you, your Honor. I am sure my Chicago office would prefer I leave town earlier. So maybe morning is better.

THE COURT: All right. Let's set it for 2:00 o'clock on Thursday, April 21.

And at that point, Mr. Edelson, you can raise whatever issues you want with regard to the supplemental materials, the response, et cetera, et cetera. Hopefully it's 75 pages and more, I am sure, worth of materials. So we will try our best. I will try my best to get through it, and I am sure you will too.

MR. EDELSON: We'll read quickly, your Honor.

MR. JEFFERSON: Are you placing an additional limitation on the defendants to the extent that any supplementation must be matters that are in the record today, such that they can't go outside of the record and bring something into the -- into the case now that is not part of the -- part of the record?

THE COURT: Mr. Jefferson, let's see what they file. Okay? And then rather than, as you say, prejudging anything, let's see what they file. We'll take a look at the information they provide. And then we will go from there. Okay?

All right. Very good. We'll see then.

MR. MESTER: Thank you, your Honor.

MR. JEFFERSON: Thank you, your Honor.

MR. BERMAN: Thank you, your Honor.

(Which were all the proceedings had at the hearing of the within cause on the day and date hereof.)

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true, correct and complete transcript of the proceedings had at the hearing of the aforementioned cause on the day and date hereof.

/s/Alexandra Roth _____ 3/4/2016

Official Court Reporter
U.S. District Court
Northern District of Illinois
Eastern Division

Date